

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



# 74-1149

B  
Pgs  
6

---

**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

Docket 74-1149

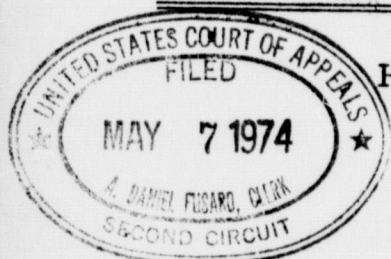
A/S CUSTODIA,  
*Petitioner-Appellant,*  
—against—

LESSIN INTERNATIONAL, INC.,  
*Respondent-Appellee.*

---

**REPLY BRIEF FOR PETITIONER-APPELLANT**

---

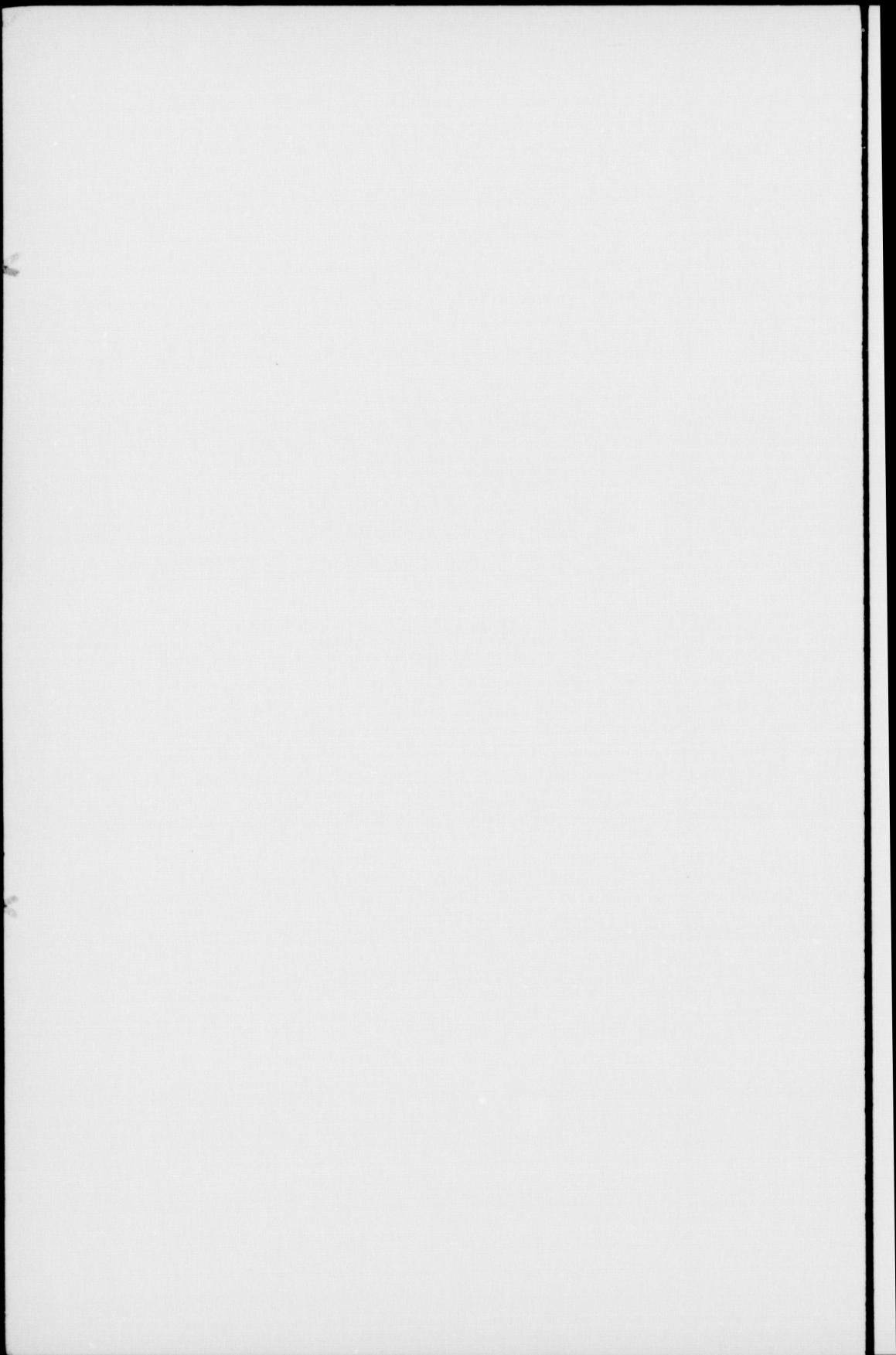


HAIGHT, GARDNER, POOR & HAVENS  
*Attorneys For Petitioner-Appellant*  
One State Street Plaza  
New York, New York 10004  
(212) 344-6800

JOHN J. REILLY  
DONALD J. KENNEDY

*Of Counsel*

---



# United States Court of Appeals

FOR THE SECOND CIRCUIT

---

No. 74-1149

---

A/S CUSTODIA,

*Petitioner-Appellant,*

—against—

LESSIN INTERNATIONAL, INC.

*Respondent-Appellee.*

---

## REPLY BRIEF FOR PETITIONER-APPELLANT

### I

#### THE FEDERAL ARBITRATION ACT DOES NOT REQUIRE A SIGNED WRITTEN AGREEMENT

In its Brief the Respondent-Appellee, argues that since the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 restricts an enforceable arbitration agreement to "an agreement in writing", Chapter 2 of the Federal Arbitration Act applies only to arbitration agreements in writing. This argument is incorrect.

Chapter 2 of the Federal Arbitration Act was enacted to implement and provide for enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards; but the legislation is broader than the Convention in several respects. In any event even the Convention applies to unsigned arbitration agreements. Para-

graph 2 of Article II of the Convention defines the term "agreement in writing" as follows:

"2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties *or contained in an exchange of letters or telegrams*. (Emphasis added)."

Of course the italicized portion of the above quotation precisely describes the circumstances of the case at bar. We submit that the above quotation is also an accurate definition of the term "agreement in writing" as that term is used in Chapter 1 of the Federal Arbitration Act. See Domke, *Commercial Arbitration* p. 46, quoted at Appellant's Brief p. 7.

Moreover, as noted above, the implementing legislation (Chapter 2 of the Federal Arbitration Act) is broader than the Convention and by its terms applies to "an arbitration agreement . . . arising out of a legal relationship, whether contractual or not, which is considered commercial, including a transaction, contract or agreement . . ." 9 U. S. C. § 202. There is no requirement that the relationship/transaction/agreement be in writing or evidenced by a writing.

The Respondent-Appellee's doubts as to "whether the Convention or implementing statute may ever be used by our courts to enforce an arbitration agreement claimed to have been made in New York for arbitration here" is also unfounded. The uncontroverted pleadings in this case reflect that Petitioner-Appellant is a corporation organized and existing under the laws of the Kingdom of Norway. (App. 3a) The Petitioner-Appellant is the Owner of the Norwegian flag vessel the M/V "FERNGROVE". (App. 7a) The basic contract was for the carriage of cargo from the United States to Taiwan. (App. 7a) Thus the

agreement comes squarely within the provisions of 9 U. S. C. § 202 on several grounds:

1. One of the parties to the agreement is a foreign corporation;
2. The basic contract provides for carriage of cargo aboard a foreign flag vessel to a foreign port.

Moreover, 9 U. S. C. § 202 specifically states that Chapter 2 applies to arbitration agreements which provide for arbitration "within or without the United States". Finally, there is no requirement in Chapter 2 that the arbitration agreement be in writing much less signed.

## II

### **RESPONDENT'S ONLY DEFENSE TO THE PETITION TO COMPEL ARBITRATION RAISES A TRIABLE ISSUE OF FACT**

On page 4 of its Brief, Respondent-Appellee seems to deny the assertion in Paragraph 5 of the Affidavit of Haakon Steckmest wherein Mr. Steckmest alleges that "the terms of [the] contract were agreed to by the Owners and the Charterers, Messrs. Lessin International Inc.". (31a) Respondent-Appellee argues that Mr. Steckmest's assertion is a "matter plainly beyond Steckmest's personal knowledge and [is] a conclusion, at best" (Brief of Respondent-Appellee, Page 4.) Although the Respondent-Appellee has never specifically denied that its brokers, Ocean Freightling & Brokerage Corporation ("Ocean Freightling"), had authority to act for the Respondent-Appellee, it would appear that the Respondent-Appellee is trying to raise this issue by implying that Mr. Steckmest never dealt directly with the Respondent-Appellee.

In *Interocean Shipping Co. v. National Shipping & Trading Corporation*, 462 F. 2d 673 (2d Cir. 1972), this Court held that the question of whether the charter brokers, in that case, had authority to act on behalf of the Respondent, in that case, was a question of fact to be determined at a full trial pursuant to Section 4 of the Federal Arbitration Act.

In the case at bar the Respondent alleges that it will meet the Petitioner's claim on the merits in the pending admiralty action. It is submitted that aside from the question of damages the only issue which would be tried in the admiralty action is the same issue which we claim should be tried pursuant to Section 4 of the Federal Arbitration Act, i.e.,—did the Owners and Charterers agree to the terms of the charterparty contract set out on pages 7a through 14a and 33a through 41a of the Joint Appendix, as alleged by Mr. Haakon Steckmest.

In fact we contend that on the present state of the record the Respondent's attempt to deny the "making of the arbitration agreement" is so weak that it is questionable as to whether the Respondent has succeeded in raising a genuine issue, in the absence of which the Respondent should be summarily compelled to proceed to arbitration. See *Almacenes Fernandez, S.A. v. Golodetz*, 148 F. 2d 625 (2d Cir. 1945); *Ocean Industries, Inc. v. Soros Associates International, Inc.*, 328 F. Supp. 944, 948 (S. D. N. Y. 1971). However in view of the comments in the *Interocean* decision, *supra* noting the importance of receiving evidence not only on the relationship between the parties but also on the customary practices of the charter brokerage business, it would seem that a full trial on this issue would be in order.

**CONCLUSION**

Accordingly, it is respectfully requested that the judgment ordered by the United States District Court for the Southern District of New York, dismissing the petition be reversed and that the case be remanded to the District Court for trial pursuant to Section 4 of the Arbitration Act, on the issue of whether or not the parties have entered into an enforceable arbitration agreement.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS  
*Attorneys for Petitioner-Appellant*  
One State Street Plaza  
New York, New York 10004  
(212) 344-6800

JOHN J. REILLY  
DONALD J. KENNEDY

*Of Counsel.*

RECEIVED  
FBI NEW YORK  
UNDERWOOD & LORD

MAY 7 11 39 AM '74

2 copies rec'd  
y

